ANS

November 30, 2000

Document Management Branch (HFA-305)
Food and Drug Administration
5630 Fisher Lane Room 1061
Rockville, MD 20852

To Whom It May Concern:

Re: FDA Docket Number: 00P-0788

The undersigned petitioner for the above referenced petition submits these comments to clarify the position of Advanced Neuromodulation Systems, Inc. ("ANS") as this relates to comments which were not available for public review until well after the November 3, 2000 closing date for comments. In particular, ANS addresses comments made by the only other manufacturer to submit comments. This manufacturer is Medtronic Neurological ("Medtronic"), which in 1980 sought to market an Implantable Pulse Generator ("IPG") through the premarket, 510(k), notification process but elected to decline petitioning for reclassification notwithstanding its belief that the IPG was substantially equivalent to the existing Class II RF coupled device. (See Exhibit A.)

ANS believes that the 1980 Medtronic substantial equivalence position was correct and that a petition for reclassification in 1980 would have been appropriate. However, ANS also recognizes that the present controls applicable to Class II devices are vastly superior and contrast significantly from those which were applicable in 1980. These controls which apply to Class II devices are the result of amendments to the Federal Food, Drug, and Cosmetic Act (the "Act") in 1990, 1992, and 1997 as well as implementation of additional regulations appearing in the Code of Federal Regulations ("C.F.R."). Some of these are summarized as follows:

1. **Premarket Notification Order** –
   Section 510(k) of the Act requires issuance of an order before a Class II device can be commercially distributed lawfully. This "Order" is comparable to the premarket approval ("PMA") for Class III devices, because the applicant must satisfy the Food and Drug Administration ("FDA") that it complies with the special controls necessary to establish reasonable assurance of safety and effectiveness through the substantial equivalence determination.

2. **Special Controls** –
   Section 513(a)(1)(B) of the Act authorizes the FDA to require compliance with controls beyond compliance with a performance standard. Prior to 1990, the only difference between a Class I and a Class II device was the requirement for biennial FDA inspection and compliance with a performance standard. Yet, the FDA was unable to finalize development of a performance standard for any device prior to 1990. The flexibility to apply additional controls provided by the 1990 amendments were enhanced by the Food and Drug Administration Modernization Act of 1997 which authorized the FDA to consider the least burdensome means of demonstrating substantial equivalence as part of the 510(k) premarket notification submission.

3. **Good Manufacturing Practice/Quality System Regulation ("GMP"/"QSR")** –
   Although a GMP regulation existed in 1980, since 1996, the much more comprehensive QSR regulation appearing in 21 C.F.R. Part 820 has been in effect. The QSR, as authorized by changes to the Act in 1990, requires compliance with design controls – a requirement which

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addresses some of the concerns expressed by Medtronic. Additionally, the QSR imposes significant documentation of practices and procedures which were not in effect in 1980. Contrary to the impression created by Medtronic, the FDA can inspect a firm prior to issuance of an "Order" to assure compliance with the QSR.

4. **Medical Device Reporting ("MDR")**–
   In 1980 there was no requirement to report adverse events to the FDA. Such reporting enables the FDA and the manufacturer to detect deviations from expected performance to reduce the possibility of future harm to the public. Since 1984, manufacturers have been required to comply with requirements appearing in 21 C.F.R. Part 803.

5. **User Facility Reporting** –
   The 1990 amendments authorized the FDA to require submission of reports of adverse events by user facilities in order to detect unfavorable performance or trends. This regulation appearing in 21 C.F.R. Part 803 has been in effect since 1996 and requires direct reporting to the FDA.

6. **Removals and Corrections** –
   Regulations appearing in 21 C.F.R. Part 806 as authorized by the 1990 Amendments require notice of specific device corrections or removals which impact safety or effectiveness.

7. **Civil Money Penalties** –
   Since 1990, manufacturers who violate provisions of the Act are subject to civil money penalties in addition to other civil and criminal penalties. The potential for FDA application of any or all of these penalties function to discourage violations of the pervasive provision of the Act applicable to Class II devices.

8. **Global Harmonization/U.S.-European Mutual Recognition Agreements** –
   The 1997 Food and Drug Administration Modernization Act ("FDAMA") directs that regulatory requirements applied by other governments be considered. The European Union ("EU) for years has applied an approval process which requires compliance with ISO quality standards and safety review by a notified body to obtain clearance and which also requires appearance on the label of the CE mark certifying acceptance for commercial distribution. The ANS IPG as well as the Medtronic IPG have obtained such certification and are available for the intended use in Europe.

ANS believes that compliance with the special controls identified by the FDA are adequate to provide reasonable assurance of device safety and effectiveness. ANS is also confident that the FDA would not issue an "Order" to any applicant unless it was satisfied that compliance with pervasive Class II special controls is established. Issuance of the "Order" for Class II devices, like issuance of a PMA for a Class III device, enables the FDA to discharge its responsibility to prevent an unreasonable risk of substantial harm to possible patients. Because the IPG is a restricted device for which access to the implantation of the entire device is made jointly by the physician and the patient, full disclosure enables the patient to make an informed choice. Finally, the responsible device manufacturer has the continuing burden before and after issuance of an "Order" to maintain compliance with the Act. This is true for manufacturers of devices subject to PMA review, because issuance of the PMA cannot guarantee the possibility of an adverse incident or a device recall. As a matter of fact, Medtronic has experienced numerous recalls of its PMA devices and received numerous Warning Letters from the FDA for its failures to comply with applicable provisions of the Act.

ANS submitted this petition because it believes that FDA application of special controls is adequate to protect the public. Both ANS and the FDA complied with the requirements of the Act and regulations relating to classification and petitions for reclassification. These requirements as applied by the FDA have resulted in the classification of approximately 1800 types of devices. Contrary to

criticisms by Medtronic, ANS complied with the explicit requirements of 21 C.F.R. § 860.123. Moreover, the FDA and the Advisory Panel discharged their responsibilities in accordance with the explicit requirements of the Act and regulations. Medtronic provided documents in opposition prior to the September 17, 1999 Advisory Panel meeting; made a presentation during the Advisory Panel meeting; provided additional opposition comments subsequent to the Advisory Panel recommendation, and, in a very unusual meeting with FDA representatives on July 27, 2000, again undertook to express its opposition to the possible clearance by "Order" of competitive devices. Its request to extend the comment period was granted, and its continuing criticisms of personnel and process are inappropriate and inapplicable as a matter of law. Additionally, its repeated efforts to cite case law as applied to the pre 1990 Act simply confirm the authority of the FDA to apply its discretion in determining the appropriate method to clear devices for commercial distribution.[1]

Medtronic's use of a 1995 FDA letter from Dr. Susan Alpert to support their opposition to the reclassification is misplaced. The reference in the letter to "passive" is incorrect, because the implanted portions of the Class II device are active. More important, Dr. Alpert merely acknowledges and explains why at that time, the device was a Class III device requiring PMA approval prior to commercial distribution. Finally, her letter does not bind or otherwise obligate or commit the FDA to the views expressed as clearly explained in 21 C.F.R. § 10.85(k).

Although Medtronic has submitted a lengthy request for FDA reconsideration of its decision, ANS believes that its prior comments and the existing administrative record including the public hearing of the Advisory Panel address the relevant issues which FDA must address to sustain its position and the majority recommendation of the Advisory Panel. ANS looks forward to completion of the IPG reclassification and expresses its confidence that compliance with the special controls identified by the FDA will enable it and other potential competitors to demonstrate substantial equivalence adequate to permit commercial distribution of safe and effective devices through issuance of a premarket notification clearance "Order."

Respectfully,

Drew Johnson
Director, Regulatory Affairs

[1] Ethicon, Inc. v. Food and Drug Admin., 762 F. Supp. 382 (D.D.C. 1991); Contact Lens Mfrs. v. Food and Drug Admin., Etc., 766 F.2d 592 (1985).

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DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION
SILVER SPRING, MD. 20910

OCT 29 1980

Mr. Russell W. Felkey
Sr. Product Regulation Manager
Medtronic, Inc.
3055 Old Highway Eight
P.O. Box 1453
Minneapolis, MN 55440

Re: K802514 - Medtronic Totally Implantable Spinal Cord Stimulation System

Dear Mr. Felkey:

The Food and Drug Administration (FDA) has completed its review of your premarket notification submission K802514 under Section 510(k) of the Federal Food, Drug, and Cosmetic Act.

Based upon our review, we have concluded that the Medtronic Totally Implantable Spinal Cord Stimulation System is not substantially equivalent to any device that was in commercial distribution before May 28, 1976, or to any device introduced since that date which has been classified in Class I (General Controls) or Class II (Performance Standards). This decision is based on the fact that your design is based on a totally implanted device as compared to the R-F coupled principle employed in the design of the preenactment device, and also based on major differences in the electrical stimulation parameters being employed.

Therefore, your device is classified by statute in Class III (Premarket Approval), under section 513(f) of the Act.

Premarket Approval. Section 515(a)(2) of the Act requires Class III devices to have an approved premarket approval application before they can be legally marketed, unless the device is the subject of an investigational device exemption under Section 520(g) or unless the device has been reclassified.

To prepare a premarket approval application, statutory provisions appearing in Section 515(c) of the Act must be followed. Until regulations for premarket approval applications have been promulgated, we suggest you follow the pertinent parts of the regulations for new drug applications in 21 CFR, Part 314, as guidelines.

Investigational Use. In the absence of an approved premarket approval application, a Class III device may be distributed only for investigational use. Enclosed for your information, is the final regulation for investigational devices which was published in the Federal Register on January 18, 1980. We believe the regulations set forth desirable procedures and safeguards for the conduct of clinical investigations. The label for such devices must indicate that the devices are for investigational use only.

Petition for Reclassification. If you believe that your device should not have to undergo premarket approval before it is commercially distributed, you may petition FDA for reclassification of your device under section 513(f)(2) of the Act.

Premarket approval applications, investigational device exemption requests, and petitions for reclassification should be submitted to:

Food and Drug Administration
Bureau of Medical Devices
Document Control Center (HFK-20)
8757 Georgia Avenue
Silver Spring, Maryland 20910

Any commercial distribution of this device prior to approval of an application for premarket approval or the effective date of any order by the FDA reclassifying your device into Class I or II, would be a violation of the Federal Food, Drug, and Cosmetic Act.

Should you require any additional information concerning our decision or the alternatives available to you under the law, please contact:

James R. Veale
Director, Division of Anesthesiology
and Neurology Devices (HFK-430)
Bureau of Medical Devices

Sincerely yours,

Robert S. Kennedy

Robert S. Kennedy, Ph.D.
Associate Director for
Device Evaluation
Bureau of Medical Devices

Enclosure

From: LINDA BRIGGS (972)309-8023
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